Memorandum and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

No. 72 H 224

COMMUNIST PARTY OF INDIANA, *et al.*,

Plaintiffs,

v.

EDGAR D. WHITCOMB, *et al.*,

Defendants.

No. 72 H 230

INDIANA AMERICAN INDEPENDENT PARTY,

Plaintiff,

v.

EDGAR D. WHITCOMB, *et al.*,

Defendants.

No. 72 H 245

INDIANA PEACE AND FREEDOM PARTY, *et al.*,

Plaintiffs,

v.

EDGAR D. WHITCOMB, *et al.*,

Defendants.

Memorandum and Order

The captioned three civil rights cases allegedly filed pursuant to 42 U.S.C. § 1983 raise substantially similar issues regarding the constitutionality of Ind. Ann. Stat. § 29-3812 and, more particularly, as such section contains a requirement for a loyalty oath required of existing or newly organized political parties or organizations in order that their names be placed on the ballot in Indiana.

Separate motions to dismiss in each action filed by all defendants have been and are denied. This court has jurisdiction. All three causes have been consolidated for hearing and determination, and trial on the merits has been advanced and consolidated with hearing on the respective motions for preliminary injunction.

Numerous contentions have been advanced by the respective plaintiffs in support of their position and various defenses have been interposed in each action by the defendants. Because these actions come on for consideration within hours of the deadline by which Indiana must commence the printing of both its state and national ballots, it is impossible to exhaustively deal in this memorandum with all of the issues advanced and, in order to meet the deadline indicated by the evidence and imposed upon this court, immediate decision is required. Needless to say, consideration has been given to all contentions advanced by the plaintiffs and all defenses raised by the defendants.

We have concluded that the loyalty oath, so-called, contained in Ind. Ann. Stat. 29-3812 is severable and that, as so separated, the first portion is constitutional and the second segment is unconstitutional. That is, that portion of the statute providing "that it does not advocate the overthrow of local, state or national government by force or

violence," is constitutional and hence enforceable by Indiana. That portion of the statute and oath providing "and that it is not affiliated with and does not cooperate with or have any relations with any foreign government or any political party, organization or group or individual of any foreign government" is unconstitutional as vague and overbroad and therefore unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and hence may not be required. Accordingly, because of the uncertainty which has arisen by virtue of the requirements of the Indiana statute, a portion of which is unconstitutional as above noted, it is no more than just to require the defendant members of the state election board to permit the three political parties plaintiff (Communist Party of Indiana, Indiana American Independent Party, and Indiana Peace and Freedom Party) to submit by the time hereinafter specified an oath pursuant to the context of this opinion and, if so submitted, be then certified by the state election board for inclusion on the state and/or national ballot upon which such party seeks inclusion as hereinafter specified.

Accordingly, it is considered and ordered that the defendants be and they are hereby ordered and directed to

(1) Accept from any one or all of the Communist Party of Indiana, the Indiana Peace and Freedom Party, and Indiana American Independent Party an oath consistent with this opinion at any time prior to 2:00 p.m. on Friday, September 29, 1972, and said defendants shall have available to such parties a member, representative or agent of the state election board for the receipt of such oath.

(2) In the event that the Communist Party of Indiana shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant state election board and the members thereof shall certify said party and cause their inclusion on the National Ballot printed in the State of Indiana as well as upon the labels used on all voting machines in this state.

(3) In the event that the Indiana American Independent Party shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant state election board and the members thereof shall certify said party and cause their inclusion on the state ballot printed in the State of Indiana as well as upon the labels used on all voting machines in this state.

(4) In the event that the Indiana Peace and Freedom Party shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant state election board and the members thereof shall certify said party and cause their inclusion on the National Ballot and the state ballot printed in the State of Indiana as well as upon the labels used on all voting machines in this state.

Enter: September 28, 1972

[Judges' Signatures Omitted]

Order of October 4, 1972

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

Civil No. 72 H 224

[CAPTION OMITTED]

The plaintiffs in the captioned cause have filed a pleading entitled "Petition for Mandate to Enforce the Prior Order of the Court." Allegedly the petition refers to the order of the three-judge panel designated to hear this and two companion cases, which order was entered September 28, 1972.

The defendants in the captioned cause have filed a pleading entitled "Verified Motion to Reconsider and for Stay." In this motion, the defendants contend that they were not given appropriate time or opportunity in which to test the validity of signatures on the petition presented by the Communist Party of Indiana. However, in view of the fact that the State Election Board, acting in accordance with this court's order of September 28, 1972, denied the plaintiffs a place on the National ballot in Indiana, there is no issue remaining concerning the validity of signatures on plaintiffs' petition. Accordingly, the issue raised by the defendants' motion to reconsider is moot and defendants' motion does not require further ruling by this court.

The petition for mandate filed by the plaintiffs is denied. The State Election Board acted in accordance with the precise wording of this court's order of September 28, 1972.

Entered by authority of the entire panel this 4th day of October, 1972.

United States District Judge

Order of October 31, 1972

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

No. 72 H 224

[CAPTION OMITTED]

On motion of the plaintiffs, leave is granted to withdraw plaintiffs' Notice of Appeal heretofore filed, and said Notice of Appeal is now withdrawn.

The motion of the plaintiffs to amend the memorandum and order issued by this court on September 28, 1972 is denied.

This order is entered pursuant to the authority and vote of the entire panel designated to hear and consider this cause.

Entered this 31st day of October, 1972.

United States District Judge

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

Civil Action No. 72 H 224

COMMUNIST PARTY OF INDIANA, *et al.*,

Plaintiffs,

—VS.—

EDGAR D. WHITCOMB, *et al.*,

Defendants.

Pursuant to 28 U.S.C. § 1253, all plaintiffs in the above-captioned cause hereby give notice that they appeal to the United States Supreme Court from that portion of this court's Memorandum and Order of September 28, 1972 which held that IND. ANN. STAT. § 29-3812 is severable and that, as so separated, that portion of said statute providing "that it does not advocate the overthrow of local, state or national government by force or violence, . . ." is constitutional and hence enforceable by Indiana.

INDIANA CIVIL LIBERTIES UNION
WILLIAM RASTETTER
R. DAVY EAGLESFIELD
527 Thomas Building
Indianapolis, Indiana 46204

[Served by mail November 28, 1972; received and filed by Clerk on November 29, 1972.]

AFFIDAVIT

We, the undersigned officers of the Communist Party of Indiana, upon our oaths do hereby swear that said Party does not advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action."

/s/ Simon Boorda
Simon Boorda, Chairman
Communist Party of Indiana

/s/ Avanelle Boorda
Avanelle Boorda, Treasurer and
Acting Secretary
Communist Party of Indiana

State of Indiana,
County of Marion, *ss.*:

Subscribed and sworn to before me, a Notary Public in and for the above county and state, this 29th day of September, 1972.

/s/ Melissa D. Pollard
Melissa D. Pollard
Notary Public

My commission expires:
May 31, 1976

Filed
Sep 29 1972
State Election Board
11:36 AM.

Official Opinion No. 11

STATE OF INDIANA

INDIANAPOLIS

OFFICES OF ATTORNEY GENERAL
THEODORE L. SENDAK, Attorney General
219 State House
46204

August 28, 1972

Mr. Karl Stipher
Member, State Election Board
Room 1015 State Office Building
Indianapolis, Indiana 46204

OFFICIAL OPINION No. 11

Dear Mr. Stipher:

This is in response to your request for my official opinion on the following question:

> "Are the provisions and requirements of IC 1971, 3-1-11-12, as found in Burns' Ind. Stat. §29-3812, which requires political parties to sign a loyalty affidavit still valid and enforceable and can the Communist party be placed on the Indiana ballot without signing said affidavits?"

ANALYSIS

Your question presents two separate legal issues, one whether the statute requiring what may be characterized as a loyalty oath be signed prior to being placed on the

Indiana ballot, and secondly, whether the Communist Party could be placed on the Indiana ballot in any event. The statute to which you refer provides, in part, as follows:

> "No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. * * * No existing or newly organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear. The election board with which such affidavit is filed shall make, or cause to be made such investigation as it may deem necessary to determine the character and nature of the political doctrines of such existing or proposed

> new party * * * and if the board is of the opinion that such existing or proposed new party advocates doctrines which are in violation of the provisions of this act or that any of the statements in said affidavit are false, the board shall not permit such ticket or candidates on the ballot. (Acts 1945, ch. 208, §117.)"

This Act was considered and upheld by the Supreme Court of Indiana in 1968 when called on to review the Indiana Election Board's decision *not* to place the names of candidates of the Socialist Labor Party on the election ballot for that year. In denying the Socialist Party's request to be placed on the ballot for failure to properly file the affidavit as required by Burns' Section 29-3812, and in considering the same, the Indiana Supreme Court found:

> "The legislature, very apparently, intended that any political party that appeared on the ballot of Indiana must negate, by affidavit, affiliation with any foreign government that in any manner seeks violent overthrow of the government . . . . It is obvious from reading of the affidavit filed by the Socialist Party that it did not meet the requirements of the 1945 Act, *supra,* [Acts 1945, Chapter 208, Section 117, as found in Burns' 29-3812] and therefore, was insufficient." *State ex rel., Socialist Labor Party* v. *The State Election Board of Indiana*, 1968 —— Ind. —— 241 N.E. 2d 69.

Though the Court's attention in the Socialist Labor Party case was primarily directed to determining whether or not there had been proper compliance with the Act, the

question of the constitutionality of the statute as a whole can be reasonably assumed to have been before the Court as well. When the Supreme Court of Indiana held that the Socialist Labor Party was not eligible to be on the ballot in Indiana, it impliedly ruled the Act to be constitutional and enforceable. This is the most recent interpretation in Indiana of this Act.

Other states which have considered similar statutes have upheld them. The Supreme Court of Florida has held that a loyalty oath which required the affiant to state that he or she was not a member of the Communist Party and has not and will not lend aid, support, advice, counsel or influence, to be in all respects constitutional. *State* v. *Diez* (1957) —— Fla. ——, 97 So. 2d 105.

The Supreme Court in Ohio reached a similar conclusion in *Berry* v. *Hummel* (1944), 59 N.E. 2d 238 —— Ohio ——.

The Federal Courts have been called upon to examine statutes similar in form and content to Indiana statute (Burns' Section 29-3812) and to determine their constitutionality. A Three-Judge Federal District Court in Michigan held that the state had no duty to permit one of the party members to run for Congress on the Communist ticket when he might not, in good faith, take the statutory oath to protect and defend the Constitution of the United States. *Albertson* v. *Millard* (1952), 106 F. Supp. 635.

The State of Massachusetts requires public employees to subscribe to the following oath:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth

of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method."

An individual seeking employment with a state hospital refused to take the oath, and suit was brought to have it declared unconstitutional. In a 1972 decision, the United States Supreme Court, speaking through Chief Justice Burger, held:

> *"Since there is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, no constitutional right is infringed by an oath to obide by the constitutional system in the future." Cole* v. *Richardson* (1972), 40 L. W. 4381, —— U.S. ——. [Our emphasis.]

The Court determined in *Cole* v. *Richardson, supra*: "We conclude that the Massachusetts' oath is constitutionally permissible."

On May 30, 1972, the United States Supreme Court reaffirmed this position when it refused to hear an appeal from a lower court in a case challenging the validity of an Ohio statute which is quite similar to the Indiana statute in question. In that case, the Socialist Labor Party desired to be placed on the election ballot in Ohio but did not feel that the requirement of submitting an affidavit affirming loyalty to the State and the United States was constitutional.

The lower court upheld the constitutionality of the Ohio statute, and the United States Supreme Court, in refusing to hear an appeal from that decision, stated:

"... their pleading fails to allege that the requirement [affirming loyalty by affidavit] has in any way affected their speech or conduct, or that executing the oath would impair the exercise of any right that they have as a political party." *Socialist Labor Party et al.* v. *Gilligan, et al.* (1972), 40 L. W. 4581, —— U.S. ——.

The provisions of Burns' Section 29-3812, *supra*, are valid and binding, and any political party which fails to adhere to the provisions which require the signing of the loyalty oath described therein must not be placed on the Indiana ballot.

Your question also presents a second issue, i.e., whether the Communist Party could be placed on the Indiana ballot even if its officers signed the loyalty oath. It should be pointed out that any state officials who allowed the Communist Party's name to be placed on the Indiana ballot would also run the risk of Federal criminal prosecution under the provisions of the Communist Control Act of 1954, which is found at 50 U.S.C. §842, and reads as follows:

"The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession, thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have

heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated . . . ." 50 U.S.C. §842.

Congress began the Act with a finding and declaration of fact, which is important, and reads, in part, as follows:

"Section 841 findings and declaration of fact . . . The congress finds and declares that the Communist party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges according to political parties, but denying to all others the liberties guaranteed by the constitution * * *. Unlike members of political parties, members of the Communist party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members * * *." 50 U.S.C. §841.

The statute here serves primarily to insure the citizens of this State and Nation protection from the danger of electing a member of a subversive group such as the Communist Party to any governmental office. The necessity of such legislative safeguards is obvious.

Official Opinion No. 11

Your attention is also directed to 18 U.S.C. §2385, which is commonly referred to as the "Smith Act," and provides, in part, as follows:

> "SEC. 2.(a) It shall be unlawful for any person—(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

Accordingly, in knowingly placing the Communist Party on the Indiana ballot, those state officials who attempt to do so would violate the Indiana law, the Federal *Communist Control Act*, and the Federal *Smith Act*.

The leading Federal case in point is *Dennis* v. *United States* (1950), 341 U.S. 494, in which the Supreme Court of the United States upheld the convictions of persons who were found to have organized and aided the Communist

Party of the United States of America, as violative of the Smith Act. Justice Vinson, in the majority opinion held:

> "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed attack, it must follow that no subordinate value can be protected." 341 U.S. 494, at p. 509, and
>
> "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." 341 U.S. 494, at p. 509.

Also, in that case:

> "The Chief Justice accepted the findings of the Second Circuit Court of Appeals, U.S. v. Dennis, 183 F. 2d, 201, that 'the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by members of the Party; that the literature of the Party and the statements and activities of its leaders * * * advocate, and the general goal of the Party was, during

the period in question, to achieve a successful overthrow of the existing order by force and violence.' Concurring, Mr. Justice Frankfurter concluded: 'The Communist Party was not designed by these defendants as an ordinary political party. * * * It (the jury) found that the Party entertains and promotes this view, not as a prophetic insight or as a bit of unworldly speculation, but as a program for winning adherence and as a policy to be translated into action.' Mr. Justice Jackson, concurring in the same case, observed that 'unless we are to hold our Government captive in a judge-made verbal trip, we must approach the problem of a well-organized, nation-wide conspiracy * * * The Communist Party realistically is a state within a state, an authoritarian dictatorship within a Republic.'"

CONCLUSION

It is, therefore, my Official Opinion that the provisions and requirements of IC 1971, 3-1-11-12, as found at Burns' Ind. Stat. Ann. Section 29-3812 (1969 Repl.) are currently valid and enforceable, and prohibit from appearing on the ballot the name of any political candidates who, or parties whose officers, refuse to sign the affidavit required by that statute.

The Indiana law recited in the foregoing analysis clearly prohibits placing on the ballot any so-called political party or organization which advocates the overthrow of the government or carries on a program in any way affiliated with a foreign government or related to any political group within any foreign government.

Furthermore, because of the nature and avowed goals of the Communist Party, the United States Congress and the Supreme Court of the United States have declared that such an organization is not a political party in the same sense of the word as an indigenous political party in a representative democracy. Therefore, the Communist Party would not be eligible to appear on the Indiana ballot even if its officers should sign an affidavit because that would be an obvious perjury in view of the Communists' stated purposes. And those Indiana officials who would be responsible for placing the Communist Party on the ballot could be subject to Federal criminal prosecution as well under the *Smith Act* and the *Communist Control Act*.

There is no constitutional or common-sense requirement for a free state to fertilize the seeds of its own destruction.

Yours truly,

THEODORE L. SENDAK
Attorney General of Indiana